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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 188.

EDWARD H. TITUS,
Petitioner,

vs.

LOU C. WALLICK,
Respondent.

ANSWER BRIEF OF LOU C. WALLICK, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI AND MOTION TO PRINT ABBREVIATED RECORD.

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STATEMENT OF CASE.

We have examined the brief of petitioner, plaintiff below. We cannot agree with a number of the conclusions drawn to which counsel refer as facts. Hence, we

feel impelled to set forth a brief history of this litigation and the issues and facts involved as we understand them. Bold-faced type is ours excepting where otherwise noted.

The Pleadings and the Trial in the Court Below.

The issues are joined on the petition, amended answer, amendment to amended answer and the reply to the amended answer.

The petition sets forth a judgment of three hundred eighty-nine thousand one hundred three dollars and twenty-one cents ($389,103.21) alleged to have been recovered in the Supreme Court of New York county, state of New York. An exemplified copy of the judgment is annexed to the petition.

The amended answer of the defendant sets up defenses as follows:

1. The judgment in the New York proceedings is not responsive to the issues tendered by the pleadings.

2. The plaintiff in the action at bar, in Franklin county, Ohio, is not the real party in interest.

3. The judgment in the New York proceeding was procured through fraud practiced upon the New York court and upon the defendant, in that the plaintiff was at no time, from the very institution of the suit, the real party in interest and surreptitiously suppressed that fact.

4. A general denial.

The amendment to the amended answer pleads the New York real party in interest statute, which was in force at the time of the institution of the proceeding in New York and has continued in force since that time.

The reply admits the allegations of the amendment to e amended answer and alleges that all matters set up the amended answer were adjudicated in the New ork proceeding.

The cause came on for trial in the Court of Common eas, Franklin county, Ohio (Columbus), before Hon- able Charles A. Leach, January 20, 1936. A jury was aived with consent of the court. The evidence offered the triai consisted entirely of documentary evidence. t the trial the plaintiff asked permission to take deposi- ons in New York to prove delivery of Plaintiff's Ex- bit D, and permission to take such deposition was anted.

The opinion of Judge Leach of the trial court was an- unced April 21, 1936. Thereafter, the plaintiff filed a otion requesting the court to state in writing the con- usions of fact found separately from the conclusions law. The court complying with that request, found at the issues raised by the first defense (that the judg- ent in New York was not responsive to the issues) uld not be relitigated; **that the plaintiff was not the al party in interest in the action at bar and had no ght to maintain this action in Ohio in his name**; and at the plaintiff practiced a fraud upon the New York urts and upon the defendant (the respondent at bar) the procurement of the judgment and therefore the dgment is impeachable in this action. Copy of the al court's conclusions of fact and law are annexed to is brief.

History of the New York Case.

The New York case was instituted December 22, 1925, by the filing of a complaint and the issuing of summons.

The plaintiff primarily was claiming the ownership of two hundred and fifty shares (250) shares of the common stock of The Secor Hotel Company, of Toledo, Ohio, an Ohio corporation, which two hundred and fifty (250) shares represented a one-fourth (¼) interest in the company and which two hundred and fifty (250) shares plaintiff claimed he owned by virtue of an oral promise made in 1906, nineteen (19) years before the suit was brought. The plaintiff in addition to his claim for the recovery of said shares included grounds for relief in the way of **an accounting against the defendant for dividends or other sums** received by the defendant **to which the plaintiff was entitled** by reason of his ownership of said shares.

The first trial before Justice Proskauer resulted in a dismissal of the plaintiff's complaint.

The plaintiff then appealed to the Appellate Division. The Appellate Division on the inanimate printed record proceeded to reverse the trial court who had seen and heard the witnesses and the Appellate Division did not order a new trial but rendered judgment for the plaintiff for the recovery of the two hundred and fifty (250) shares of stock and **directed an accounting of sums received as dividends or otherwise by the defendant, applicable to said shares.**

Thereafter, an order was issued appointing Joseph Kahn, Esquire, to take the accounting.

The accounting continued from April, 1928, to Janu-
, 1929.

In January, 1929, the defendant discovered that the
intiff had fraudulently and surreptitiously suppressed
dence. That is, on November 23, 1925, the plaintiff,
ward H. Titus, and one London I. Wallick, estranged
ther of the defendant, drafted and executed a written
reement whereby the plaintiff, Edward H. Titus,
reed to prosecute this claim against the defendant and
n if the plaintiff was not successful, London I. Wal-
k was to prosecute some alleged claim of his against
defendant and then they were to share fifty-fifty in
results of either action. The plaintiff had, on the
ginal trial, been questioned as to whether or not he
d made any agreement with London I. Wallick about
case or about the claims and he absolutely denied
t any such agreement had been made. **The defendant
this ground moved for a vacation of the judgment
d for a new trial and the trial court held that the
intiff, Edward H. Titus, had perpetrated a fraud
on the court. The judgment was vacated long after
m.**

The plaintiff then appealed to the Appellate Division
d the Appellate Division could not escape the conclu-
n that the plaintiff had perpetrated a fraud upon the
rt.

The second trial of the New York case in December,
0, again resulted in a dismissal of the complaint.

Thereupon, the plaintiff appealed to the Appellate Di-
ion and the Appellate Division, again upon the cold

printed record reversed the trial court, rendered judgment of ownership in the plaintiff of the stock and ordered an accounting.

Thereupon, the defendant appealed to the Court of Appeals which affirmed the Appellate Division without opinion.

On May 11, 1932, an order of reference was made appointing Edmund McCarthy, Esq., to take the accounting.

McCarthy in his report of February 24, 1933, found no sums due from the defendant to the plaintiff.

Thereafter, the referee's report was refused by the trial court and a second referee, Jeremiah T. Mahoney, was appointed.

Referee Mahoney thereafter made a finding that although the plaintiff was entitled to no accounting for dividends the defendant had "wrongfully" withdrawn or caused to be withdrawn, (by way of alleged incorrect accounting in amortizing a lease, alleged excessive salaries to officers, alleged improper stock purchases, etc.) one million, fifty-nine dollars and twelve cents ($1,000,059.12) from the funds of The Secor Hotel Company to which he added five hundred and eleven thousand, two hundred and twenty-six dollars and nine cents ($511,226.09) interest and then proceeded to find that the plaintiff was entitled to one-fourth (¼) of that amount directly from the defendant **entirely disregarding The Secor Hotel Company and the fact that it was not a party to the case.**

The finding of Referee Mahoney was approved by the Supreme Court by opinion, Volume 2, "Case on Appeal,"

page 881, Defendant's Exhibit No. 5, the opinion being as follows:

> "The opinion of the learned referee in which he lucidly states the basis of every ruling he has made is a complete answer to every point made by the defendant in opposition to the motion to confirm the report. The report is confirmed. Submit judgment. Dated April 13, 1934. E. J. McG."

Thereupon, judgment was entered up against the defendant for three hundred seventy-seven thousand, eight hundred twenty-one dollars and thirty cents ($377,821.30).

On appeal to the Appellate Division, the Appellate Division affrmed the Supreme Court.

The petition in the case at bar was filed in the Common Pleas Court of Franklin county, Ohio, on August 20, 1934.

The Affidavit, the Assignment and the Fraud.

In 1934 after the judgment sued on by plaintiff was recovered in the New York courts, London I. Wallick, estranged brother of Lou C. Wallick, the defendant, brought an action in New York against Edward H. Titus, the plaintiff herein, London I. Wallick claiming that he owned a one-half (½) interest in the judgment sued upon herein and asked for a temporary restraining order enjoining Edward H. Titus from disposing of the judgement or the proceeds. London I. Wallick based his claim upon the aforesaid agreement between him and Edward H. Titus of November 23, 1925. In opposition to the application of London I. Wallick for that restraining

order, Edward H. Titus, defendant therein and plaintiff herein, made an affidavit dated August 17, 1934, Defendant's Exhibit No. 7, which his attorneys filed September 7, 1934, in the New York case on behalf of Edward H. Titus, plaintiff herein.

Note: The petition at bar was filed August 20, 1934.

In said affidavit (Defendant's Exhibit No. 7) at the bottom of page five and top of page six thereof, Edward H. Titus deposes as follows:

> "I told him at that time (meaning November 23, 1925) that **I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

At the top of page eleven of said affidavit, Edward H. Titus deposes as follows:

> "His retention of said sum of $2,500.00 is likewise consistent with my statement that the plaintiff herein knew in November, 1925, and prior to the execution of the instrument of November 23, 1925, **that I had assigned my interest in the case against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

At the bottom of page eleven and the top of page twelve of said affidavit, Edward H. Titus deposes as follows:

> "The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, **I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife.** The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted

that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished."

This affidavit (Defendant's Exhibit 7), made in 1934, shows that Edward H. Titus has no interest whatever in this judgment and that he assigned away all of his interest in the claim prior to the time the suit was instituted in New York.

In connection with plaintiff's motion herein in the trial court to strike defendant's answer from the files, on the ground that it was a sham, defendant produced the affidavit, Exhibit 7, and **then appellant for the first time** produced the two instruments discussed by appellant in his brief (Defendant's Exhibit 8 and Plaintiff's Exhibit D). The first instrument dated March 31, 1924, is an absolute assignment from Edward H. Titus to Walter L. Titus of the entire claim. The second instrument dated December 1, 1925, is a power of attorney from Walter L. Titus to Edward H. Titus, the purpose of which, as expressed in the third "whereas" paragraph, was an attempt to authorize Edward H. Titus to bring suit. An analysis of the instrument of December 1, 1925, is:

1. The instrument of December 1, 1925, is no more than a bare power of attorney to Edward H. Titus to collect the claim and to bring suit.

2. It expressly appoints Edward H. Titus "true and lawful attorney" for Walter L. Titus with powers of substitution.

3. It provides that Edward H. Titus will receive the stock and money **"as property of" Walter L. Titus** and

will immediately endorse, deliver and transfer the same to Walter L. Titus.

4. If a trust has been created by the instrument of December 1, 1925, **the trustee is Walter L. Titus. If Edward H. Titus has any interest whatever in the judgment and claim, it is merely contingent.** The power of attorney was to authorize Edward H. Titus to bring an action, nothing more, and the **power was not incidental to other powers or duties given to Edward H. Titus.**

5. However, the affidavit of Edward H. Titus of August 17, 1934, shows conclusively that he, Edward H. Titus, after his assignment to his brother, no longer had or claimed any interest in the claim. The affidavit denies that he has any interest in the claim or judgment.

As stated by Judge Hornbeck of the Court of Appeals for Franklin county, Ohio, in his opinion, concurred in by the remaining Judges Barnes and Geiger **the second instrument which was executed December 1, 1925,** just before the suit in New York was instituted, **gave the plaintiff, Edward H. Titus, no authority whatever under the New York law or under the Ohio law to prosecute the action in his name.**

At the institution of this case in the Common Pleas Court, Franklin county, Ohio, plaintiff was not the real party in interest. The trial judge made the following finding:

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name."

The Court of Appeals in its decision stated:

> "With the finding that the plaintiff was not the real party in interest in the action in Ohio and in New York we are in accord upon a fair consideration of the status of the plaintiff, his brother and the defendant."

This finding by the trial court and affirmed by the Court of Appeals and undisturbed by the Supreme Court, constituted a local question of procedure involving the construction and interpretation of the procedural real party in interest statute of the state of Ohio and in no way involved the full faith and credit clause of the United States Constitution.

At the time of the institution of the New York case, plaintiff had assigned away his claim. Although the New York law required that the action be prosecuted in the name of the real party in interest, the plaintiff prosecuted the action in his name although he had no interest in the same and represented himself throughout the action to be the real party in interest and suppressed the fact that he was not.

On the witness stand in the case in the state of New York, Edward H. Titus testified and represented that he was the only one interested in the alleged claim.

The trial court below, Judge Leach, made the following finding of fact:

> "9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and

during said litigation suppressed and concealed the fact from the court and from the defendant."

As conclusions of law the trial judge made the following findings:

"4. That the **plaintiff's judgment** procured in the courts of New York **was procured through fraud practiced upon the New York courts and upon the defendant,** in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.

"5. That during said litigation in the courts of New York, **the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims** upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted.

"6. That the **said judgment** so obtained in the state of New York was and **is impeachable therefor fraud and it was and is to the same extent impeachable in the courts of Ohio."**

A complete copy of the findings of the trial judge are attached as Appendix A.

After the decision of the trial court was announced plaintiff filed a motion for new trial, assigning certain errors. A copy of the motion is attached to this brief as Appendix C. No constitutional question is raised by those assignments.

In appealing to the Court of Appeals in Ohio it was necessary for plaintiff to specify the claimed errors to

e reviewed. Attached as Appendix B is a copy of those ssignments of error. No constitutional question is aised by those assignments.

When this case came to the attention of the Supreme ourt of Ohio, no constitutional question had been prop-rly raised and there was no basis for review on that round. And since the Supreme Court of Ohio had in **rown v. Ginn**, 66 O. S., 316, construed the real party in nterest statute (a purely local question) squarely on the oints raised, there remained nothing for the Ohio Su-reme Court to review. Hence the motion before it, to ertify up the record, was properly denied.

ssues at Bar Below.

The issues were three in number as follows:

I. The purported judgment in the New York proceed-ngs is not responsive to the issues tendered by the leadings, nor to the matters actually controverted.

II. **The plaintiff in the action at bar in the Common Pleas Court, Franklin county, Ohio, was not the real party in interest.**

III. The purported judgment in the New York pro-eeding was procured through fraud practiced by the laintiff upon the New York court and upon the defend-nt in that plaintiff was at no time the real party in nterest and he surreptitiously suppressed and concealed hat fact.

The trial court found against the defendant on the first ssue. The trial court found in favor of the defendant n the second and third issues and the trial court wa

affirmed by the Court of Appeals, in which affirmance the three judges of the Court of Appeals concurred. The Supreme Court of Ohio refused to review.

The action was for a personal judgment against the defendant, predicated on the pleaded judgment obtained in New York. The federal constitution, of course, provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. There is no debatable question about that. The issue, however, was, second, whether plaintiff could sue in his name in an Ohio court, and, third, whether or not the plaintiff had procured the judgment in the New York courts through practicing fraud on the court and on the defendant in the procuring of the judgment. **The second issue was a local question.**

As to the third issue, **if the fraud was practiced on the court and on the defendant in the procuring of the judgment, then the plaintiff has no judgment to which any faith or credit is to be given. There is no debatable or substantial question about that. The trial court held as a matter of fact that the plaintiff had practiced a fraud on the defendant and on the New York court in procuring the New York judgment,** and the trial court found as a matter of law that for that fact the judgment is impeachable in New York as well as elsewhere. **The Court of Appeals properly affirmed these findings by an unanimous decision.** The third from the last paragraph of the opinion of the Court of Appeals is as follows:

> "It is our judgment that the trial court properly applied the law in the determination that the plaintiff suppressed and concealed from the court and from the defendant the fact that he was not a proper party plaintiff and the real party in interest in the action against the defendant in New York, and in finding that such conduct was extrinsic fraud in prosecuting the cause to judgment, which supported the third defense of the answer."

ARGUMENT.

SUMMARY OF ARGUMENT.

Proposition 1. There is an independent ground of state procedure as the basis of the decisions below involving no federal question, and broad enough to sustain the judgment, and hence this court is without jurisdiction.

Proposition 2. It does not appear that the Supreme Court of Ohio dealt with the question of fraud in the procurement of the New York judgment. A federal question was not properly presented before that court, and it must be concluded that the only question considered by the Supreme Court of Ohio was the question of local procedure under the Ohio real party in interest statute.

Proposition 3. It does not affirmatively appear that a federal question was properly presented to the Supreme Court of Ohio, or that a federal question was actually decided, or that the decision of a federal question was necessary to a determination.

Proposition 4. Even though it should appear in doubt as to which of the grounds the Ohio Supreme Court considered, this court has no jurisdiction for the reason that one of the grounds is a local procedural matter involving the construction and application of a local procedural statute.

Proposition 5. The trial court, sitting as a jury, found that the plaintiff as such in the Ohio court, was

not the real party in interest under the Ohio statute. The trial court found further that the plaintiff in the New York proceeding had perpetrated a fraud upon the New York courts and upon the defendant in obtaining the alleged judgment sued upon in Ohio. These facts were not disturbed by the reviewing courts of Ohio, and are binding upon this court.

PROPOSITION I.

The Ohio Courts Decided Against the Petitioner on an Independent Ground of State Procedure.

This court in the case of **Gaar, Scott and Company v. Shannon**, 223 U. S., 468 at 470, lays down the following rule:

> "For as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the federal questions, even though they may have been actually considered and determined adversely to his contention."

And in **Hammond v. Johnson**, 142 U. S., 73 at 78, the court had earlier made the following observation:

> "It is well settled that where the Supreme Court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

The plaintiff petitioner in the Common Pleas Court of Franklin county, Ohio, started this action by filing a

petition against the defendant asking for a money judgment.

The procedural statute of Ohio provides that an action must be prosecuted in the name of the real party in interest.

Section 11241 of the **Ohio General Code** is as follows:

> "An action must be prosecuted in the name of the real party in interest, except as provided in the next three succeeding sections. When a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired."

Section 11244 of the **Ohio General Code** is as follows:

> "An executor, administrator, or guardian, a trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law."

These sections of the Ohio statutes had been construed by the Supreme Court of Ohio prior to the institution of the action at bar and particularly in the case of **Brown v. Ginn**, 66 O. S., 316.

To the petition of the plaintiff petitioner, the defendant in the trial court, pleaded a separate and distinct defense that the plainiff was not the real party in interest and therefore could not prosecute this action in Ohio in his name. The trial court on the evidence, and sitting as a jury by consent of the parties, found that the plaintiff was not the real party in interest in the action at bar

under the law of the forum, and therefore, could not maintain this action in his name. This question was one of local procedure under the state statutes and as construed by the decisions of the Supreme Court of Ohio. The trial court on this question was affirmed by the Court of Appeals for Franklin county, Ohio, and the Supreme Court of Ohio refused to review.

Hence upon the authority of Gaar, Scott and Company v. Shannon, supra, and Hammond v. Johnson, supra, this court will not assume jurisdiction.

PROPOSITION II.

It Does Not Appear that the Supreme Court of Ohio Dealt with any Federal Question.

In the assignments of error, filed in the Court of Appeals for Franklin county, Ohio, no federal question was raised. The errors assigned are characterized by that court in the fourth paragraph of its opinion as follows:

> "There are fourteen errors assigned, which may be grouped under the general headings that **the judgment is contrary to law and against the manifest weight of the evidence; the court erred in admitting certain evidence; in the conclusions of law and fact and in refusing to find 'whether a reassignment of the claim (upon which the judgment in New York was rendered) was made by Walter L. Titus to Edward H. Titus on December 1, 1925.'**"

After the Court of Appeals had concurred in the findings of the trial court and the legal conclusions reached by the trial court, the plaintiff petitioner took two

courses of procedure in going to the Supreme Court of Ohio: first he filed a motion in the Supreme Court of Ohio asking for an order "directing said Court of Appeals to certify its record to the Supreme Court" on the ground "that said case is one of both public and general interest" within meaning of Article IV, Section 2 of the Ohio Constitution, and with that motion he filed assignments of error in which for the first time, the plaintiff petitioner specifically claimed that a federal question was involved in the way of violation of the full faith and credit clause of the United States Constitution; second, the plaintiff filed in the Supreme Court of Ohio an appeal as of right on the ground that "a debatable constitutional question" was involved. The defendant respondent then filed a motion to dismiss the appeal as of right. The Supreme Court of Ohio, without opinion, dismissed the appeal taken as of right and overruled the motion to certify.

Either of two propositions of local Ohio law would have disposed of the appeal as of right in the Supreme Court of Ohio:

> **"If the constitutional question claimed to be involved in the case is not submitted to or decided by the Court of Appeals, the motion to dismiss should be sustained."**
>
> **Hoffman v. Staley**, 92 O. S., 505.

> **"If the record * * * does not show that the disposition of the case requires the consideration of any constitutional question, it will be dismissed for want of jurisdition."**
>
> **2 O. Jur.**, 63.

As to the motion to certify, there was no question of public or general interest for the consideration of that court for the very good reason that the Supreme Court of Ohio had previously in Brown v. Ginn, supra, decided the procedural question involved and consequently that question was foreclosed against the plaintiff petitioner.

Hence it does not appear that the Supreme Court of Ohio dealt with any federal question, but on the contrary, based its ruling on the question of local procedure.

In this connection we quote from Volume 5 of Hughes Federal Practice, page 315:

> "A federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter where it does not appear that the state court dealt with the question, and where it appears that the state court may have refused to deal with it on the ground that it was not raised in the trial court."

PROPOSITION III.

It Does Not Appear that the Decision of a Federal Question Was Necessary to the Determination by the Supreme Court of Ohio.

This court in the case of **Whitney v. California**, 274 U. S., 357 at 360, spoke as follows:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and **expressly or necessarily decided by such state court.**"

No federal question was **expressly** decided by the Supreme Court of Ohio and no federal question was **necessarily** decided by the Supreme Court of Ohio for there was an independent ground for the decision of the trial court as well as of the decision of the Court of Appeals for Franklin county which ground involved no federal question, and hence the Supreme Court of Ohio could have disposed of and in all probability did dispose of the case on that independent ground which involved no federal question.

PROPOSITION IV.

At Least There Is Doubt Whether the Supreme Court of Ohio Dealt with a Federal Question.

Where it does not appear upon which of two grounds the decision was based, whether the federal or non-federal ground, then if the independent ground on which it might have been based was a good and valid one, sufficient to sustain the judgment, this court will not assume jurisdiction.

Klinger v. Missouri, 13 Wall., 257.

PROPOSITION V.

The Decisions of the State Courts Rest Upon a Finding of Facts Made by the State Trial Court. This Court Will Not Weigh the Evidence.

In the case at bar the trial judge sitting as a jury with the consent of the parties, made a finding of facts at the special written request of the plaintiff petitioner. It was found from the evidence that the plaintiff petitioner was not the real party in interest in the Ohio court. It was also found that the judgment sued upon was procured through fraud practiced upon the defendant and upon the New York courts by the plaintiff petitioner. The Court of Appeals for Franklin county, Ohio, weighed the evidence and stated in its opinion that it was in accord with the findings of the trial court. This court will find in the record ample evidence supporting those findings.

This court in the case of **Ry. Co. v. Donaldson, Administrator**, 246 U. S., 121 at 124, spoke as follows:

> "The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question."

DISCUSSION OF PETITIONER'S BRIEF.

In the first trial of the New York case the plaintiff petitioner testified that he was the only one interested in the case. Defendant's Exhibit 1, page 133, second part, folio 399. Long after judgment against the defendant pursuant to the first trial there, in the New York courts,

the defendant discovered that plaintiff and London Wallick, estranged brother of defendant, had prior to the institution of the New York suit, entered into a fifty-fifty split agreement to divide the proceeds of the New York suit and further that if the plaintiff was unsuccessful, then London Wallick would start some kind of a suit against the defendant and Titus would share fifty-fifty in the proceeds of that litigation. For fifty-fifty agreement see Defendant's Exhibit 3, page 626.

Justice Valente, on motion of defendant for a new trial in the New York Supreme Court, held that the plaintiff had in suppressing this fifty-fifty agreement, practiced fraud upon the court and upon the defendant and he set the judgment aside. Defendant's Exhibit 3, page 761. The Appellate Division could not escape this same conclusion.

Then on the second trial, the plaintiff in half truths and by misleading testimony, knowing that counsel for defendant was under the mistaken impression that some kind of an agreement had been made after the New York suit had been filed, suppressed the fact of his assignment to his brother which had been made twenty-one (21) months before the New York litigation had been started. Defendant's Exhibit 3, page 163, folio 489.

Then in 1934 at the time the action at bar was started in Ohio, the plaintiff filed his affidavit, Defendant's Exhibit 7, in the London Wallick action in New York for injunction, in which affidavit the plaintiff deliberately states that prior to November 23, 1925, he had assigned away all of his interest in the claim, to his brother and

wife and that he, the plaintiff, no longer had any interest in the judgment or in the claim.

When the plaintiff was confronted in the Ohio court with the affidavit, then plaintiff came forward for the first time with the assignment, Defendant's Exhibit A, and the writing, Plaintiff's Exhibit D.

Then the plaintiff proceeded to contend that in spite of the affidavit and the assignment he was still and always had been the real party in interest, and that any way the matter was res judicata even though the plaintiff had suppressed the fact and defendant had not discovered it.

One way to characterize the issue in this case is to put it this way: may a party for his benefit, say to one court, "I have no interest in this claim or judgment," and at the same time say to the court of the sister state, "the claim and judgment is mine." This is a simple proposition as to whether or not there is any rule of good words and whether a party may at his whim repudiate and deny that which he has solemnly stated and that which his written documents bear out.

Briefly, we call attention to the New York law on the question of the New York real party in interest statute. Section 210 **Civil Practice Act of New York**, pleaded in amendment to amended answer and admitted by plaintiff in reply, is as follows:

"Section 210. Action to be brought in name of real party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made, for the benefit of another, or a person

expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

Spencer v. Standard Chemicals & Metals Corporation, 143 N. E., 651; Ct. of App. N. Y., 1924 (237 N. Y., 479):

"Syllabus 1. Under Code Civil Procedure Sections 111, 113 (Civil Practice Act, Section 210), assignee must have legal or equitable title to thing assigned to sue in his own name as real party in interest, irrespective of consideration paid, purpose of assignment, or use to be made of proceeds collected.

"Syllabus 2. One empowered by instrument to prosecute suits for recovery of debts, etc., due the maker, in name of either, **held** not trustee of express trust, or assignee of legal title or equitable interest, but mere attorney in fact, not authorized to sue in his own name as real party in interest, under Civil Practice Act, Section 210."

Page 652: "Andrews, J. When we adopted our scheme of reformed practice, one purpose being to end in part the ancient distinctions between law and equity, we provided that every action must be prosecuted in the name of the real party in interest. Code of Procedure, Section 111. A few exceptions were made. A trustee of an express suit, for instance, might still sue without joining with him the person for whose benefit the action is prosecuted and later such a trustee was defined to include one with whom or in whose name a contract is made for the benefit of another. Code of Procedure, Section 113. Theretofore, as the commissioners on practice and pleadings pointed out in their report, if the assignee sued at law he was turned out of court, and if the assignor sued in equity he was turned out also. So the rule adopted in courts of equity was made general, 'that he who has the right is the person to pursue the remedy.' First Report, page 124. It was not the design to give a new cause of action where none previously existed, but to permit and require

the beneficial owner to enforce his rights in his own name.

"The real party in interest has been defined by this court: 'If, as between the assignor and the assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest.' Cumings v. Morris, 25 N. Y., 625.

"In other words, the plaintiff must have some title, legal or equitable, to the things assigned. Hays v. Hathorn, 74 N. Y., 486. If the assignee have such title it is enough. The consideration paid, the purpose of the assignment, the use to be made, of any proceeds collected, is immaterial. Allen v. Brown, 44 N. Y., 228; Meeker v. Claghorn, 44 N. Y., 349; Sheridan v. Mayor, etc., of New York, 68 N. Y., 30; Brown v. Powers, 53 App. Div., 251, 65 N. Y. Supp., 733. But legal title or equitable interest he must have.

"This action is brought by Harold R. Spencer to recover the balance of the purchase price of certain ore said to have been sold by one Quan Kai to the defendant. It was alleged in the complaint that the cause of action had been duly assigned to the plaintiff. This was denied. At the close of the plaintiff's case the purported assignment was offered in evidence. This instrument named Spencer as attorney for Quan Kai, and gave him, among other things, 'power to commence or prosecute any suit or action or other legal proceedings for the recovery of damages, * * * debts, demands, choses in action, causes or things whatsoever in the United States of America due or to become due to me and to prosecute and follow and discontinue the same if he shall deem it proper and for me and in my or his name to take all steps and remedies necessary and proper for the recovery * * * of any * * * sum or sums of money, choses in action or other things whatsoever that is, are, or shall be by my said attorney thought to be

due * * * to me in my right or otherwise, and also for me and in my name to compromise, settle, and adjust all causes.' The attorney was also authorized to sign any release or receipt and he was given power to substitute other attorneys in his place. When this instrument was offered in evidence objection was made that it was not competent because it did not constitute an assignment but was a mere power of attorney. The attention of the trial judge was therefore sharply called to this question. The paper was received in evidence and an exception taken.

"The plaintiff is clearly not within any of the definitions of the trustee of an express trust. No legal title to the claim against the defendant was assigned to him. Neither does it appear that he has any equitable interest therein. Upon the face of the paper the attorney's duty is simply to collect what may be due to Quan Kai solely for the latter's benefit and to transmit it to him. It is the ordinary case of the appointment of an attorney in fact. The attempt to authorize such attorney to sue in his own name is, under the provisions of Section 210 of the Civil Practice Act, which in this respect follows the original code, entirely unavailing."

ere Fraud Is Practiced by a Party in Procuring a Judgment, the Judgment Is Assailable on that Ground in a Sister State and Without First Making Application to the Court Rendering the Judgment.

the impeachability of a foreign judgment, the general rule is stated in 15 R. C. L., page 935, as follows:

"But **the weight of authority today is that a judgment of another state**, relied on as a cause of action, **may be impeached on the ground that it was obtained by fraud**, unless the parties raising the question of fraud are estopped from availing themselves of it by reason of participation in such fraud."

The court of last resort of the state of New York in **Gray v. Richmond Bicycle Company**, 167 N. Y., 348, recognizes that application need not be made to the court rendering the judgment in order to assail the same on the ground of fraud in the procurement thereof. The following is syllabus three of that case:

> "Relief from fraudulent foreign judgment may be granted by courts of this state. **Relief may be obtained from the judgment, if fraudulent, without the application to the courts of the other state**, and it cannot be indirectly enforced as a bar to the action, since a court of this state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state."

A judgment may be attacked any time, anywhere, for fraud practiced as in this case in prosecuting the action. This is well recognized in the above New York case as well as in **Martin Corley, infant by Walter Duncan, his Guardian ad litem, v. New York and Harlem Railroad Company**, App. Div. Sup. Ct. of N. Y. 1896; 12 App. Div. (N. Y.), 409, pages 410-411:

> "On the ground of fraud practiced upon the court and jury during the trial, the judgment should be set aside and a new trial granted. It was said in Ward v. Town of Southfield (102 N. Y., 287) by Earl J.: 'A party defeated in a litigation may appeal from the judgment or move for a new trial, and, in a proper case, to vacate and set aside the judgment. These remedies are generally ample to protect all parties. But where there is fraud not in the subject of litigation, not in anything which was involved in the issue tried, but fraud practiced upon a party.

or upon the court during the trial, or in prosecuting the action, or in obtaining the judgment may be attacked collaterally, and on account thereof set aside and vacated' This is a case of 'fraud practiced upon a party * * * during the trial'; and if it is ground for a collateral attack, it is certainly ground for setting aside the judgment in the same action, as the Ward case plainly indicates. That case was cited and applied to the case of a motion in the same action, in Harris v. Ditson (13 N. Y. St. Repr., 337), a case decided by the General Term in this department."

nslee as Administratrix, etc., v. Rochester and Syra-e Railroad Company, 214 App. Div. (N. Y.), page 680, n example of fraud in prosecuting an action:

"A new trial will be granted in an action to recover damages for the wrongful death of plaintiff's intestate, her son, where it appears that the complaint alleged that the intestate left him surviving his mother, and did not allege that the father of the intestate, who had been divorced from the intestate's mother was living also, and did not on the trial bring that fact to the attention of the jury and in fact, fraudulently concealed the existence of the father and permitted associate counsel to refer to the mother as a widow, and such fact was not discovered by the defendant until after the close of the trial and the entry of judgment."

Complainant alleged that the son was wrongfully led and that the mother only survived him. No refere was made to the father. In the trial, plaintiff was stantly referred to as the "widow." The Appellate ision ordered a new trial, because the attorney of the intiff knew that the father was living and did not so

state and further permitted the associate counsel to refer to the plaintiff as "widow." The court said on page 62:

"What effect such a statement several times repeated might have on the sympathies of the jury we do not know but the statement was made and was not supported by any evidence. In making this statement to the jury to the effect that plaintiff was a widow, counsel had no intent to deceive, for he was probably without knowledge as to the actual status of the plaintiff, but his reference to her as a widow was not based on any evidence in the case and was, therefore, improper.

"**Good faith required that the fact that decedent left a father surviving him should have been disclosed either in the complaint or on the trial, but it is quite clear that there was an intent to conceal that fact** and let the case go to the jury on the theory that the plaintiff was a widow and the sole next kin of decedent.

"Whether or not the father contributed to plaintiff's support is not important. **The fact that he was living** and, therefore, the plaintiff was not the sole next of kin of decedent **was surreptitiously withheld**. A judgment thus obtained should not stand. The court cannot approve a practice which in effect amounted to a legal fraud and a judgment thus tainted must be set aside. (Stevens v. C. N. Bank, 144 N. Y., 50; Wolff v. United Drug Company, Inc., 181 App. Div., 628.)"

In this very case in the New York courts, the New York courts held that suppression by Edward H. Titus of the fact of his agreement with London I. Wallick concerning a partial assignment of the claim, constituted a fraud upon the court. A fortiori the suppression by the plaintiff of the fact of an absolute and entire assignment certainly constitutes fraud upon the New York courts as well as upon the defendant.

In the case at bar, the judgment assumed the existence a real plaintiff in interest. That issue was not raised tried in the New York case because of the ignorance the defendant and the surreptitious concealment of the cts by the plaintiff. Hence the doctrine of res judicata ed on by petitioner has absolutely no application. w it appears that there was no real plaintiff in interest. Counsel cite several New York cases to sustain their tement that a judgment will not be set aside or en- rcement enjoined by reason of intrinsic fraud. We ve no quarrel with that proposition. In Jacobwitz v. rson, the unsuccessful party in an arbitration proceed- g sought to set aside the award on the ground of per- ry, that the successful party and his witness testified lsely on the issues. The court said that although per- red testimony alone is not sufficient to set aside a dgment, however, a judgment would be set aside where has been procured through fraud or other undue means, hich would include the fraudulent or improper conduct a party. In the case at bar, the plaintiff was guilty of udulent and improper conduct in the procurement. In matter of Holden cited by counsel, the assignments question were as the New York court stated perfectly lid until legally set aside. The assignors by their act d vested legal title in the assignee. The fraud com- ained of was between the parties to the assignment d related to what the court characterized as a remote nsaction. The fraud in the case at bar consists of intiff representing to the New York court and to the fendant that he was the real party in interest and of rreptitiously withholding and concealing the fact that

he was not the real party in interest, when all the time he had not even a color of interest.

In the hypothetical case assumed in Harrington v. Denny, J. Otis sets forth the same kind of facts as in United States v. Throckmorton discussed infra and naturally reaches the same conclusion.

In Wright v. Saltmarsh, the court said "The contention that the decree of distribution was obtained by fraud in not disclosing the fact of the probate proceedings in the state of Kansas cannot be urged for the reason that to disclose such proceedings would have no effect whatever upon rights of these parties in Oklahoma, and therefore the defendant owed no duty to the court to disclose to it what some other court in some other state had done with the property in that state." The court said further that the action was nothing more than an effort to avoid the decree of distribution on the ground of alleged false proof presented in the matter. In the case at bar the plaintiff not only testified falsely but in addition he suppressed and concealed and remained silent on the fact of which defendant was ignorant, that he the plaintiff had no interest whatever in the alleged claims against the defendant and hence had no standing whatsoever in court. The result was that the court had no real plaintiff before it.

On page 2582 of Freeman's Work, he discusses the rule of **some jurisdictions where perjury alone may constitute such fraud** as will invoke equitable relief against the judgment especially where there is willful perjury of or at the instigation of the successful party. **However**, in

the case at bar, there is something more serious than mere perjury.

The fraud in Ward v. Town of Southfield, cited by counsel was intrinsic fraud going to the subject-matter of the litigation like the other cases cited by counsel.

It is noted that counsel omit from their reference to the **Southfield case** the following, appearing at the bottom of page 292 of the report (102 N. Y.):

> "But where there is fraud, not in the subject of the litigation, not in anything which was involved in the issues tried, but fraud practiced upon a party or upon the court during the trial, or in prosecuting the action, or obtaining the judgment, then in a proper case the judgment may be attacked collaterally, and on account thereof, set aside and vacated."

Neither do counsel in their reference to the **Southfield case** include the following appearing on page 293:

> "Neither party can mislead the other by any positive or actual fraud. Nor can he, for the purpose of perpetrating a fraud upon the other party, conceal such facts as good faith and common honesty require him to reveal."

Note: The **Southfield case** is relied on in Corley v. Railroad Company, supra.

Counsels' cases deal with intrinsic fraud. With those cases we have no quarrel. However, they do not apply to the case at bar. **There seems to be an unanimity of opinion on the proposition that for extrinsic fraud a judgment may be assailed at any time, anywhere.**

In **Armstrong v. Armstrong**, 117 O. S., 558, cited by appellant, the question was whether an order for alimony to be paid in future installments, entered by a Kentucky

court, is within the protection of the full faith and credit clause. It was contended that the alimony order was not a final judgment. And as Judge Matthias stated "there has been much confusion, and contrariety of opinion" on that question. There is no confusion or contrariety of opinion concerning the question in the case at bar. The question is long and well settled and is not debatable.

After quoting the full faith and credit clause Chief Justice Fuller of this court speaks as follows: "This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor in the right of the state to exercise authority over the parties or the subject matter, **nor whether the judgment is founded in, and impeachable for, a manifest fraud.** The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the state domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence."

Cole v. Cunningham (1889), 133 U. S., 107 at 112.

In **U. S. v. Throckmorton** relied on by petitioner, the full faith and credit clause was not in any remote degree involved. The fraud was in the very issues of the case, i. e., an antidated grant supported by depositions of perjured witnesses. The United States filed a bill in U. S. District Court of California to set aside adjudications of a board of commissioners of land claims and of that

ourt affirming the commissioners. No such question as t bar was before the court. And this court has veered way from its dicta of the Throckmorton case for in **ilton v. Guyot,** 159 U. S., 113 at 207, in commenting on he Throckmorton case, the court says with respect to raud:

> "But it is now established in England, by well considered and strongly reasoned decisions of the Court of Appeals, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court."

After reciting the full faith and credit clause Van De- anter, J., states: "The effect of these provisions is that the courts of other states the judgment of a court of he state is not impeachable except for fraud or want of risdiction * * *."

Lamb v. Stock Co., 132 Federal Rep., 431 at 441.

We quote the following from various jurisdictions:

> "Under Const. U. S., Art. 4, Sec. 1, judgments of a sister state are entitled to no greater credit than will be given thereto by the courts of the state where rendered, and may, in an action thereon, be impeached for want of jurisdiction or fraud in their procurement."

Cohen et al. v. Bromberg, Syl. 1 (Iowa 1919), 170 N. W., 478.

"Though, under Const. U. S., Art. 4, Sec. 1, judgment of Ohio court is entitled to same effect in tribunals of Kentucky that it is entitled to in Ohio, it

can be attacked in Kentucky on any grounds that would invalidate it in Ohio."

Syl. 2, **Capper v. Short** (Ky. 1928), 11 S. W. (2d), 717.

"In other words, if the judgment is not conclusive, but open to a direct attack for fraud when rendered, it is also open to collateral attack on the same ground, when brought forward as a defense or a cause of action in the courts of a sister state."

Schendel v. Ry. Co., 210 N. W., 70 at 73 (Minn. 1926).

"Judgments, whether foreign or domestic may be attacked for want of jurisdiction in court trying same or for want of service or fraud in procurement."

Syl. 3, **Mendlovitz v. Shoe Co.**, 5 S. W. (2d), 589 (Texas 1928).

"Under full faith and credit clause of Const. U. S. Art. 4, Sec. 2 and Act of Congress (U. S. Comp. St. Sec. 1519) a judgment of one state sued on in another state may be impeached for fraud perpetrated in its procurement, if it might be so impeached in the state in which rendered, as in the case in Oklahoma."

Syl. 4, **Hare v. Reily** (Texas 1925), 269 S. W., 471.

"Judgment entered by court in sister state, and sued on in this state, may be set aside for fraud in obtaining it, notwithstanding Const. U. S., Art. 4, Sec. 1, requiring full faith and credit to be given to judgment of sister state."

Syl. 3, **Dyer v. Johnson** (Texas 1929), 19 S. W. (2d), 421.

"The only defenses that can be made to a judgment obtained in another state, when sued on here, are that the court of our sister state did not have jurisdiction of the person or of the subject matter, or that it was fraudulently procured, or had been paid."

Syl. 1, **White v. Minder** (N. J. 1930), 148 Atl., 781.

"The full faith and credit provision of Const. U. S., Art. 4, Sec. 1, does not prevent an inquiry, when suit is brought in one state on a judgment rendered in another, whether the judgment is impeachable for fraud."

Syl. 1, **Ring v. Whiteman** (N. C. 1927), 140 S. E., 150.

"Judgments of other states are conclusive of all questions involved in them except fraud in their procurement, and whether the parties were properly brought before the court in view of Const. U. S., Art. 4, Sec. 1, and acts of Congress enacted in pursuance thereof."

Syl. 4, **Webb v. Friedberg** (N. C. 1925), 126 S. E., 508.

"Under constitutional requirement that each state give full faith and credit to public acts and records of other states, **full faith can only be given to that which is a result of good and full faith, and credit can only be given when and where act, record or proceeding is not tainted with dishonesty and fraud** practiced upon the state issuing or participating in same."

Morris v. Morris, 1936, 280 N. Y. S., 636, Syl. 4.

"Judgment rendered by competent tribunal having jurisdiction is conclusive on merits in courts of another state unless fraud is established."

Syl. 2, **Franklin v. Lee**, 253 N. Y. S., 620 (1931).

"'Full faith and credit' clause and rule of comity of states were not intended to aid in perpetration of fraud or wrong (Article IV, Section 1, U. S. Constitution)."

Syl. 6, **Larrick v. Walters**, 39 O. A., 363.

In **Christmas v. Russell**, 72 U. S., 290, relied on by petitioner, the action was on a note, the defendant being a resident of Mississippi. By the Mississippi statute the action was barred after six years. Suit was had in Kentucky while defendant was visiting there. The Mississippi statute was set up in defense, but judgment was entered. A transcript was taken to Mississippi and suit on in the United States Court there. A further Mississippi statute provided that no action could be maintained on a judgment rendered by a court without the state against a resident of Mississippi in a case where the action would have been barred in Mississippi.

This court held the above latter statute to be void.

It was also claimed that the judgment had been obtained in fraud of this statute. This court, page 304, seemed to think that the question of fraud would have to be raised on the chancery side. And in this connection referred to **Anderson v. Anderson**, 8 Ohio, 105. In Ohio now as a matter of practice (which was not the practice at the time Anderson v. Anderson was decided) a defendant is permitted in actions at law to set up legal or equitable defenses or both.

Since Christmas v. Russell was decided this court has in Cole v. Cunningham supra recognized the right of a state to inquire into the question of whether or not the judgment of a sister state was founded in fraud.

And as late as 1935 in **Milwaukee County v. White Co.**, 296 U. S., 268, at 276, this court has recognized that recovery on the judgment of a sister state can be resisted on the ground that it was procured through fraud.

CONCLUSIONS.

I.

There is an independent ground of state procedure as a basis for the decisions below, and hence this court has no jurisdiction.

II.

The question of fraud in procuring the New York judgment is a question of fact which was found and determined by the lower courts. This court will not weigh the evidence.

III.

The alleged constitutional question is not substantial or debatable, and is settled.

ON MOTION OF THE PETITIONER TO PRINT ABBREVIATED RECORD.

Throughout the petitioner's brief he is in effect praying this court to review and weigh the evidence on the question of fraud. If the plaintiff is sincere in this request, then we submit he can scarcely expect the court to comply with his request without furnishing the complete record.

Respectfully submitted,

ROLLAND M. EDMONDS,
Attorney for Respondent.

ROLLAND M. EDMONDS,
J. E. BUTLER, and
W. M. SUMMER,
Of Counsel.

APPENDIX A.

Statement in Writing of the Facts Found Separately from the Conclusions of Law, by Judge Leach in the Trial Court.

A. Finding of Facts.

1. That by consideration of the Supreme Court in and for the county of New York in the borough of Manhattan, city of New York, on the first day of May, 1934, the plaintiff recovered a judgment against the defendant in the sum of three hundred seventy-seven thousand, eight hundred twenty-one 30/100 ($377,821.30) dollars, with interest from January 1, 1934, on the sum of two hundred fifty thousand, fourteen and 78/100 ($250,014.78) dollars, amounting to the sum of six thousand three hundred thirty-three and 71/100 ($6,333.71) dollars, together with the cost duly taxed in the sum of four thousand nine hundred forty-eight and 20/100 ($4,948.20) dollars, making in all the sum of three hundred eighty-nine thousand one hundred three and 21/100 ($389,103.21) dollars.

2. That said Supreme Court in and for the county of New York in the borough of Manhattan, city of New York, was and is a court of general jurisdiction, duly created by the laws of the state of New York.

3. That no part of said judgment has been paid.

4. That the petition in this action in the Court of Com-

mon Pleas of Franklin county, Ohio, was filed on August 20, 1934.

5. The defendant, Lou C. Wallick, appeared and took an actual part in the litigation which resulted in the judgment against him in the Supreme Court in and for the county of New York, in the borough of Manhattan, city of New York, being the same judgment pleaded in the petition in this case.

6. That subsequent to May 1, 1934, and prior to August 20, 1934 (the date on which the petition and pending cause in the Court of Common Pleas in Franklin county was filed), London I. Wallick, a brother of the defendant in this case, instituted an action in the Supreme Court of the state of New York, county of New York, in an attempt to obtain from the plaintiff, Edward H. Titus, a part of the proceeds of plaintiff's judgment in the courts of New York and filed a motion "for an injunction pendente lite restraining me (Edward H. Titus, the defendant in that case and plaintiff here) from disposing of, encumbering, pledging, assigning or in any manner dealing with the monies received or to be received on account of a judgment entered in my (Edward H. Titus) favor against one Lou C. Wallick, in the office of the clerk of the county of New York in the sum of $389,-103.21."

7. On the seventeenth day of August, 1934, the plaintiff herein, Edward H. Titus, under oath, made and filed an affidavit in the said court in opposition to London I. Wallick's motion for the injunction. In said affidavit, so filed with the court, the plaintiff stated [illegible] other

things, "I told him (London I. Wallick) at that time (November 23, 1925, when agreement between London I. Wallick and Edward H. Titus for fifty-fifty split of proceeds of the New York litigation against Lou C. Wallick, was executed, record on appeal. Defendant's Exhibit No. 3, page 626); that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus" (parenthetical insertion by the writer).

Edward H. Titus, plaintiff herein, further stated in said affidavit: "The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife * * *. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished."

8. That the facts as stated by the foregoing quoted excerpts from the said affidavit were and are true.

9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant.

10. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues

tendered by the pleadings, the court finds as a matter of fact from the evidence that such question was presented to the New York courts by the defendant in the proceedings in which the judgment was obtained.

B. Conclusions of Law.

1. Relative to the defense that the judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, the court finds as a matter of law that since said question not only could have been but was presented to the New York courts in the proceedings in which the judgment was obtained, that the same may not be re-litigated here.

2. That the affidavit of Edward H. Titus filed in the Supreme Court of the state of New York, county of New York, (Finding of Fact No. 6), is properly admissible.

3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name.

4. That the plaintiff's judgment procured in the courts of New York was procured through fraud practiced upon the New York courts and upon the defendant, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.

5. That during said litigation in the courts of New York, the plaintiff suppressed and concealed the fact that

a person or persons other than himself owned the claims upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted.

6. That the said judgment so obtained in the state of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio.

7. That the finding and judgment herein will be for the defendant.

Dated at Columbus, Ohio, this nineteenth day of September, 1936.

Charles A. Leach,
Judge of the Court of Common Pleas, Franklin County, Ohio.

APPENDIX B.

Assignments of Error Filed by Appellant With Court of Appeals, Franklin County, Ohio.

1. The court erred in rendering judgment for the defendant instead of the plaintiff.

2. The judgment is contrary to law.

3. The judgment is against the manifest weight of the evidence.

4. The court erred in overruling the plaintiff's motion for judgment in his favor at the close of all the evidence.

5. The court erred in its conclusion of law No. 2, to wit: "that the affidavit of Edward H. Titus filed in the Supreme Court of the state of New York, county of New York (finding of fact No. 6) is properly admissible" and admitting said affidavit (Defendant's Exhibit No. 7) in evidence over the objection of plaintiff.

6. The court erred in its conclusion of law No. 3, that "the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name."

7. The court erred in its conclusion of law No. 4, to wit: "that the plaintiff's judgment procured in the courts of New York was procured through fraud practiced upon the New York courts and upon the defendant, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party

in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name."

8. The court erred in its conclusion of law No. 5, that "during said litigation in the courts of New York, the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted."

9. The court erred in its conclusion of law No. 6, that "the said judgment so obtained, in the state of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio."

10. The court erred in its finding of fact No. 8 in that said finding is based upon incompetent, irrelevant and immaterial evidence, to wit, Defendant's Exhibit No. 7, and such finding is contrary to the manifest weight of the evidence.

11. The court erred in its finding of fact No. 9, to wit, that "at the institution of the suit in which the plaintiff recovered said judgment and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant"—and such finding is contrary to the manifest weight of the evidence.

12. The court erred in overruling plaintiff's motion
r a new trial.

13. The court erred in failing to find, though re-
uested by plaintiff in writing, "whether a reassignment
the claim was made by Walter L. Titus to Edward H.
itus on December 1, 1925."

14. The court erred in failing to find, though re-
uested by plaintiff in writing, whether the defendant
ad knowledge of the reassignment from Walter L.
itus to Edward H. Titus.

APPENDIX C.

Motion for New Trial in Trial Court

Plaintiff moves the court for an order setting aside the decision heretofore rendered in this case and granting a new trial, for the following reasons, to wit:

1. The decision of the court is against the weight of the evidence and contrary thereto.

2. The decision of the court is contrary to law.

3. The court erred in the admission of evidence over the objection and exception of plaintiff.

4. The court erred in excluding evidence offered by plaintiff to which objection was made and exceptions were taken.

5. The court erred in overruling plaintiff's motion for judgment at the close of defendant's case.

6. The court erred in overruling plaintiff's motion for judgment at the close of all of the evidence.

7. Other errors of law occurring at the trial of said cause prejudicial to the rights of plaintiff and by which plaintiff was prevented from having a fair trial.

8. The decision is not sustained by sufficient evidence and is contrary thereto.

Plaintiff moves the court for a judgment in his favor notwithstanding the decision of the court.